SUPREME COURT, U. S.
FEB 28 1967
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IN THE SUPREME COURT OF THE UNITED STATES

-------- Term, 1967

No. 1104

E. G. SWINDLEHURST,
Petitioner,

vs.

AMERICAN FIDELITY FIRE INSURANCE COMPANY,
a foreign insurance company; and
HENRY SALES, d/b/a Sales Welding,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MICHIGAN

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To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

JURISDICTIONAL STATEMENT

E. G. Swindlehurst, the petitioner herein, prays that a writ of certiorari issue to review the judgment of the Michigan Court of Appeals, Division 2, dated February 22, 1966, and of the Supreme Court of the State of Michigan entered in the above entitled case on July 11, 1966 and on November 7, 1966.

Petitioner submits herewith his jurisdictional statement as required by Rule 15 of the Rules of the Supreme Court of the United States.

OPINIONS BELOW

The opinion of the Court of Appeals of the State of Michigan is reported in *2 Michigan Appeals 329* and is printed in Appendix "A" hereto, infra, pages 2a-6a The judgment of the Supreme Court of the State of Michigan is printed in Appendix "A", infra, page 6a. The judgments of the Circuit Court for the County of Ingham, Michigan is printed in Appendix "A" hereto, infra, pages 1a-2a and 8a-10a.

JURISDICTION

(a) (1) The nature of this procedure is a review of the decision alleged to violate ARTICLE VII Amendment of the Constitution to the United States by deciding questions of fact after they have been submitted to a jury that made a finding thereon and doing so, contrary to the common law as interpreted by the Supreme Court of the United States.

(2) Diversity of citizenship.

(3) Departure from the accepted course of judicial proceedings on the part of the Michigan Court of Appeals, Division 2, and the Michigan Supreme Court by reason of bias in favor of defendant insurance company and prejudice against the petitioner that requires invoking the power of supervision of the United States Supreme Court.

(b) The date of the judgment sought to be reviewed is July 11, 1966. The date of entry was August 5, 1966. Rehearing was denied November 7, 1966. The filing date of the appellate action was October 27, 1964. The time to file this application was extended from February 6, 1967 to and including March 6, 1967 on February 9, 1967.

(c) The statutory provision conferring jurisdiction on appeal is Court Rule 19 (1) (a). The jurisdiction of this Court is invoked under 28 USC § 1275.

The Special and Important Reasons are:

(1) Jury tried facts were re-examined by the Court on Appeal and the jury's findings rejected.

(2) The Court on appeal did not follow the interpretation of the common law on res judicata made by the Supreme Court of the United States which is the law of the land.

(3) The Federal question is the right to a jury trial as guaranteed by the SEVENTH Amendment to the United States Constitution; it is of substance since the jury verdict of $56,000.00 is involved and the denial of this right was decided in a way not in accord with applicable decisions of the Supreme Court of the United States.

(4) There is diversity of citizenship; the defendant insurance company is a New York corporation and the plaintiff is a resident of the State of Michigan.

(5) There is bias in favor of the defendant insurance company. This is shown by the Court's use of decisive portions of cross-defendant's appellate brief as their opinion while ignoring the Trial Court's decision, and the review thereof, that occurred eight years before by the Michigan Supreme Court on the subject of res judicata — see ANNEX, pages 13-14. In addition the Court of Appeal's assessment of costs against petitioner in the amount of $1,774.85 supports the claim of bias by the Court of Appeals.

Prejudice against the plaintiff appears to exist by reason of his name, the first half and accented portion of which is "Swindle" and this appears to have influenced the Court in their decision that deprived petitioner of his right to the jury verdict without proper legal basis. The effect of this is to deny plaintiff the benefit of the jury's decision, if not for one reason then another. All reasons, however, are based on evidence presented and considered by the jury. This began with the Trial Court reducing the verdict,

continued by the Appellate Court in dismissing his case of conversion by reason of res judicata and, further, continued by the Supreme Court of Michigan rejecting the conversion reason but sustaining the results for other reasons, indicated as being the sale of the vehicles by the repairman under the Garagekeeper's Lien Law. This latter reason was the subject of voluminous instructions by the Trial Court and the verdict clearly shows the rejection as a question of fact.

(6) The Trial Court also invaded the province of the jury by weighing the amount of evidence and taking 21 months to act on a motion contrary to Court Rule that provided 20 days therefor.

(7) This issue has an effect on more than the parties involved, namely, all insured motorists in the United States.

(d) The cases sustaining the jurisdiction are:

Russell v. Place, 94 US 606, 608; 24 ed 214 (1876):

"It is undoubtedly settled law that a judgment of a court of competent jurisdiction, upon a question directly involved in one suit, is conclusive as to that question in another suit between the same parties. But to this operation of the judgment it must appear, either upon the fact of the record or be shown by extrinsic evidence, that the precise question was raised and determined in the former suit. If there be any uncertainty on this head in the record, — as, for example, if it appear that several distinct matters may have been litigated, upon one or more of which the judgment may have passed, without indicating which of them was thus litigated, and upon which the judgment was rendered, — the whole subject matter of the action will be at large, and open to a new contention, unless this uncertainty be removed by extrinsic evidence showing the precise point involved and determined."

Lowlor v. National Screen Service, 349 US 322, 326 (June 6, 1955). This case applied the res judicata interpretation found in *Russell v. Place, supra*, and distinguishes between res judicata and collateral estoppel, particularly in regard to continuing the same course of wrongful conduct and its effect on a subsequent cause of action between the same parties.

Basista v. Weir, 340 F 2d 74, 82 (Jan. 18, 1965). This is a civil rights case that applied the holding in res judicata interpretation found in *Russell v. Place, supra*, and *Lowlor v. National Screen Service, supra*.

Dick v. New York Life Insurance Co., 359 US 437. This case involved the propriety of the lower Court, depriving the plaintiff of the right to a jury decision. Certiorari was granted because of the importance of preserving for litigants their right to a jury trial.

QUESTIONS PRESENTED

(1) The question presented is whether a Court may reexamine a fact tried by a jury other than according to the rules of common law as interpreted by the Supreme Court of the United States.

(2) The question presented is whether a State Court may interpret the common law involving res judicata contrary to the interpretation given by the Supreme Court of the United States.

(3) When there is evidence sufficient to support a jury verdict for the plaintiff, may a State Court set aside the jury verdict and deprive the plaintiff of the right to a jury decision.

CONSTITUTIONAL PROVISIONS

ARTICLE VII, Amendments of the United States Constitution entitled, "Trial by Jury in Civil Cases":

"In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by

jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law."

ARTICLE II, Section 13 of the Constitution of 1908, State of Michigan, titled "Jury Trial":

"The right of trial by jury shall remain, but shall be deemed to be waived in all civil cases unless demanded by one of the parties in such manner as shall be prescribed by law."

ARTICLE I, Section 14, Constitution of 1963, State of Michigan, entitled "Jury Trials":

"The right of trial by jury shall remain, but shall be waived in all civil cases unless demanded by one of the parties in the manner prescribed by law. In all civil cases tried by 12 jurors a verdict shall be received when 10 jurors agree."

STATEMENT OF THE CASE

(a) The first instance of raising the Federal questions was on appeal to the Supreme Court of the State of Michigan. Prior to this time there had been no issue of a Federal question because the action of re-examining the facts tried by the jury or ruling contrary to the Supreme Court of the United States on the common law regarding res judicata had not occurred. It first appeared in the decision of the Court of Appeals.

(b) The method of raising the questions was an application for leave to appeal to the Supreme Court for the State of Michigan. This was done by the following application:

"The decision is in conflict with decision of the Supreme Court of Michigan and the Supreme Court of the United States.

"It violated the principle of law that a reviewing Court will not disturb the findings of the Trial Court

or jury as trier of the facts on the failure to establish an estoppel. There was a failure to recognize the distinction between the doctrine of collateral estoppel by judgment and res judicata, and citing the common law interpretation of res judicata set forth in *Russell v. Place, supra.*"

(c) The Supreme Court for the State of Michigan passed on the question by sustaining the Court of Appeals, as follows:

"* * * for the reason that while this Court does not concur in the reasoning by which the Court of Appeals reached its conclusion, nonetheless the Court is persuaded that the result reached by the Court of Appeals is correct."

The Court of Appeals had held "that Case No. 18,020, a contract action in which a judgment for defendant was rendered of no cause for action based on res judicata because of a prior contract case, was res judicata as to American Fidelity Fire Insurance Company in the instant matter (conversion-tort). The issues decided adversely to plaintiff in Case No. 18,020 (contract) are the same issues involved in the instant case (conversion)."

"The record shows that plaintiff failed to introduce material evidence that defendant Sales did not comply with the Garagekeepers Lien law (an affirmative defense of defendant Sales). Plaintiff, therefore, did not establish a prima facie case of conversion."

(d) Pertinent fact quotations are as follows:

(1) Plaintiff herein, E. G. Swindlehurst, instituted suit on September 23, 1957 alleging conversion of a tractor and trailer; the dates of these conversions were unknown. The plaintiff further alleged that the defendant had taken the vehicles for repair under the collision coverage of a contract of insurance; they had been damaged in an accident that occurred on September 5, 1950; the vehicles had not been returned to him.

(2) Discovery proceedings revealed that the tractor had been sold on November 9, 1954 by the defendant's district agent, Amos Nordman, to a Charles Rowan of Grand Rapids, Michigan; that the trailer had been sold on April 25, 1957 by the defendant Henry Sales who was the repairman designated by the defendant American Fidelity Fire Insurance Company.

(3) The defendant, American Fidelity Fire Insurance Company, filed a motion to dismiss on the grounds of res judicata, et al, on October 14, 1957, and defendant Henry Sales filed a like motion on October 24, 1957; therein were set forth the Ingham County, Michigan causes, No. 15,922 filed in 1951 and No. 18,020 filed in 1956, both being actions by the plaintiff on the contract of insurance and both being dismissed by the Court, the first being a directed verdict because of failure of the proper kind of damage proofs and the second, No. 18,020 on the grounds of res judicata referring back to the 1951 action, No. 15,922, Ingham County Circuit Court, State of Michigan.

(4) The Trial Court rendered an opinion denying the defendants' motions to dismiss on May 1, 1958. This opinion held that prior actions were based on contract and that the plaintiff had not had the choice of remedies at the time of the prior suits and that there had not been a prior determination of the conversion issue that was framed in the instant suit.

(5) The defendant, American Fidelity Fire Insurance Company, instituted an application for writ of certiorari on the Trial Court's decision to the Michigan Supreme Court. This was denied on July 24, 1958.

(6) The case was tried before a jury beginning on November 26, 1962. The basic facts were not in dispute; in excess of fifty exhibits were accepted in evidence by stipulation. The Court files of the previous cases, No. 15,922 and No. 18,020 were marked as exhibits and introduced in evidence by the defendants for jury consideration. The effect of these cases

was argued to the jury as a basis for a no cause of action verdict by the jury. The instruments pertaining to the defendant's repairman's alleged sale in which he was supposed to have secured title of the trailer for approximately $600.00 and the resale of the trailer for approximately $600.00 and the resale of the trailer for approximately $1,600.00 were put in evidence; the instruments involved in the transfer of the tractor were also received in evidence and showed similar treatment of plaintiff's vehicles. The Court instructed the jury they were the sole judge of the facts and their verdict should be based thereon. The verdict on December 4, 1962 was for $14,000.00 against the defendants jointly, and $42,000.00 against the defendant, American Fidelity Fire Insurance Company.

(7) The defendants filed motions for a new trial on December 19, 1962. In July, 1963 the defendants were permitted to amend their motion to include a motion to dismiss on the ground of res judicata and operation under the Michigan Garageman's Lien Law.

(8) The trial Court rendered an opinion granting a new trial on August 31, 1964 unless the plaintiff remitted $10,000.00 of the joint verdict and $38,000.00 of the verdict against American Fidelity Fire Insurance Company. The Court indicated "The testimony relative to whether or not the defendants did a wrongful act wilfully, wantonly or maliciously was not strong" in regard to plaintiff's claim for exemplary or punitive damages.

(9) On September 15, 1964, the plaintiff filed an appeal to the Michigan Supreme Court on the question of the Trial Court's remittitur. This action appeared to be on the Court's initiative and was taken later than 20 days after entry of judgment contrary to Michigan Court Rule 527.4. The defendants filed a cross-appeal alleging, among other things, that their motions to dismiss should have been granted on the grounds of res judicata.

(10) On February 22, 1966, the Court of Appeals, Division 2, to whom the appeal had been referred by the Michigan Supreme Court in January, 1965, rendered an opinion sustaining the defendant, American Fidelity Fire Insurance Company's defense of res judicata, and defendant Henry Sales' defense of proceeding under the Michigan Garagekeeper's Lien Law.

(11) On April 29, 1966, Division 2 of the Michigan Court of Appeals denied plaintiff's application for rehearing.

(12) The Michigan Supreme Court's decision on July 11, 1966 sustained the Court of Appeals as to the result reached while not concurring in the reasoning. This is understood to mean the grounds of res judicata was rejected but the sales under the Garagemen's Lien statute by the repairman were a proper basis for terminating plaintiff's cause of action. On re-consideration the Michigan Supreme Court, although plaintiff pointed out the erroneous facts relied on including, of course, the factual evidence presented to the jury, found it had not been made to appear that their prior order was erroneous.

Of special interest in considering the decision of the Court of Appeals and the review thereof of the Supreme Court of the State of Michigan is the fact that the defendants, American Fidelity Fire Insurance Company and Henry Sales, introduced the Court files of prior litigation between the parties at the trial of this cause, had them marked as exhibits and made available to the jury for consideration and as support of their arguments that the plaintiff had no cause for action in the conversion case under consideration. The jury verdict, infra shows this defense was rejected by the jury. This fact, considered in connection with the Michigan Supreme Court's decision on July 24, 1958 in refusing to review the Trial Court's decision on the subject of res judicata rendered April 28, 1958, should have foreclosed any further consideration of this matter. The cases so introduced in evidence were:

File No. 15,922 (1951) Ingham County, Michigan —

This case had been brought by the plaintiff for damages growing out of the defendant American Fidelity Fire Insurance Company's breach of contract and was based on the contract of insurance between the parties. At the close of plaintiff's proofs, in a jury trial, the Trial Court directed the jury to bring in a verdict of no cause for action for the reason that plaintiff had failed to show damages recoverable in a contract action (cost of repairs).

File No. 3754 (1953) Berrien County, Michigan —

This was an action by Henry Sales, one of the defendants in this cause, for the repair bill and storage of the plaintiff's trailer (the plaintiff here was named defendant there) and the Trial Court ordered E. G. Swindlehurst dismissed as a party because there was no privity of contract between Henry Sales and E. G. Swindlehurst. Henry Sales prevailed and secured judgment in the amount of approximately $2,000.00 against American Fidelity Fire Insurance Company, the other defendant here.

File No. 18,020, (1956), Ingham County, Michigan —

This was another action by the plaintiff on the contract of insurance and was brought after the law suits by the repairman indicated above and another repairman who had not been paid by defendant insurance company for his repair work on the tractor was disposed of. In this case the plaintiff was not permitted to put in his proofs. This action was interrupted by a motion to dismiss by the defendant American Fidelity Fire Insurance Company that was granted by the Court on the grounds of res judicata referring back to the 1951 Ingham County, Michigan action.

It is notable that these matters were all reviewed by the Trial Court before the trial and his decision was reviewed

by a writ of certiorari to the Michigan Supreme Court, the latter action being taken on July 24, 1958.

REASONS FOR GRANTING THE WRIT

The principal reason for granting the writ is that the appellant was denied the right to a jury decision by action of the State Court, that violated the SEVENTH AMENDMENT to the Constitution of the United States. The great damage that can occur to the rights of a person when the Trial or Appellate Court reviews the facts and takes over the function of the jury are clearly shown by this case.

As a further special and important reason for the issuance of a writ of certiorari, it is submitted that the present status of the law, as made by this case regarding insured owners of motor vehicles, is such that an insurance carrier can require the motor vehicle owner to deliver the damaged vehicle and if re-delivery is not made in accordance with the contract, there is no recourse for the motor vehicle owner. The insurer can neglect to repair, secure dismissal of law suits on the insurance contract, raise a seemingly endless list of technicalities and if the insured is fortunate enough to get his case to a jury, can have the jury's verdict swept away by further technicalities. The attempt to secure re-delivery of the motor vehicle, or recover its value, will not only fail but for making the attempt to so recover the vehicle and the loss of income during the time it was retained by the insurer, the obligation to pay court costs in the amount of $2,061.58 can be incurred. This happened to the plaintiff in this cause. While this may be deemed an isolated case, it is now legal precedent for this happening to an excess of 60,000,000 motor vehicle owners in the United States today.

CONCLUSION

Appellant submits that this appeal brings before the Court a substantial Federal question which requires plenary consideration, with briefs on the merits and oral arguments, for their resolution.

Respectfully submitted,

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ANNEX

EXTRACTS FROM DEFENDANT'S BRIEF ON CROSS-APPEAL of May 28, 1965 and EXTRACTS FROM MICHIGAN COURT OF APPEAL'S OPINION of February 22, 1966

(1) *Page 5 — Michigan Court of Appeal's Opinion:*

"Plaintiff had alternative remedies available to him, though he had but one cause of action. He could sue on the contracts of insurance for breach or he could pursue the tort remedy of conversion."

Page 28 — From Defendant's Brief:

"Plaintiff had alternative remedies available to him, though he had but one cause of action. He could sue on the contracts of insurance for breach, or he could pursue the tort remedy of conversion."

(2) *Pages 5-6 — Michigan Court of Appeal's Opinion:*

"Plaintiff having failed to make use of any remedy available to him after the adverse judgments in

previous cases, cannot avoid the consequences of failing to appeal by bringing a new suit clothed in a different form of action but based on the same cause of action."

Page 36 — From Defendant's Brief:

"Plaintiff, having failed to make use of the only remedy available to him after the adverse judgment in 18,020, cannot avoid the consequences of failing to appeal by bringing a new suit clothed in a different form of action but based on the same old cause of action."

(3) *Page 6 — Michigan Court of Appeal's Opinion:*

"The issue between the plaintiff and defendant AFFI Co. herein decided adversely to the plaintiff (Ingham County circuit court No. 18020) are the same issues involved in the instant suit."

Page 36 — From Defendant's Brief:

"These very issues were raised and decided adversely to plaintiff in 18,020. These same issues are, of necessity, involved in the instant suit."

(4) *Page 6 — Michigan Court of Appeal's Opinion:*

"The trial court in this matter erred in not granting defendant AFFI Co.'s motion to dismiss on the grounds of res judicata."

Page 38 — From Defendant's Brief:

"The trial court erred in not granting this defendant's motion for directed verdicts and for judgment notwithstanding the verdicts."

APPENDIX "A"

JUDGMENT

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF INGHAM

E. G. Swindlehurst,
Plaintiff,

vs.

File No. 18,884

American Fidelity Fire Insurance Co., a foreign insurance company, and Henry Sales, d/b/a Sales Welding,
Defendants.

At a session of said Court, held in the Court Room, City of Lansing on the 5th day of December, A.D., 1962.

Present: Hon. Sam Street Hughes, Circuit Judge.

The jury by whom the issue joined in this cause was tried having heretofore on December 4, 1962 rendered a verdict in favor of the plaintiff and against the defendants and having assessed plaintiff's damages, over and above his costs and charges by him about his suit in said behalf expended, at the sum of $42,000.00 against the defendant American Fidelity Fire Insurance Company and $14,000.00 against the defendant Henry Sales and American Fidelity Fire Insurance Company;

THEREFORE, IT IS ORDERED and ADJUDGED that the plaintiff take against the defendant American Fidelity Fire Insurance Company his damages as aforesaid in the sum of $42,000.00, together with costs and charges to be taxed, and have execution therefor; and further, that the plaintiff take against the defendant Henry Sales and the defendant American Fidelity Fire Insurance Company

as aforesaid in the sum of $14,000.00, together with costs and charges to be taxed, and have execution therefor.

Sam Street Hughes
Circuit Judge

OPINION OF THE MICHIGAN COURT OF APPEALS
(Filed February 22, 1966)
(Mich. App. No. 304)

BEFORE: McGREGOR, P.J., KAVANAGH and FITZGERALD, JJ.

McGREGOR, P. J. This is a suit for the alleged conversion of plaintiff's 1950 Ford tractor and trailer. In September, 1950, plaintiff E. G. Swindlehurst was the owner of a tractor and steel hauling trailer which were damaged in an accident. The equipment was insured with defendant American Fidelity Fire Insurance Company (hereinafter referred to as AFFI Co.) under separate policies of $250 deductible collision insurance. Both policies gave the AFFI Co. the option of repair. AFFI Co. took possession of the damaged equipment, placing the trailer with defendfendant Henry Sales and the tractor with C. C. Creed, Inc. (hereinafter referred to as Creed) for the necessary repairs. Swindlehurst considered the repair work done by Sales and Creed to be unsatisfactory and refused to pay the $250 deductible due each for their work under the terms of the insurance policies or to retake possession of the equipment. Negotiations between the parties did not lead to any solution and a long record of litigation precedes the instant case.

In July, 1951, Swindlehurst brought a suit for breach of contract against AFFI Co. in Ingham county circuit court (No. 15,922). At the conclusion of Swindlehurst's proofs, AFFI Co.'s motion for a directed verdict of no cause of action on the merits was granted by the court, based on a failure to present proof as to damages. Swindlehurst's motion for a new trial was denied and no appeal was taken.

Separate suits were brought by Sales (Berrien county No. 9754) and Creed (Berrien county No. 9935) for the

cost of repairs and storage charges, naming Swindlehurst and the AFFI Co. as defendants. A settlement was reached between Creed and the AFFI Co., and that suit was dismissed. The suit brought by Sales resulted in judgment on January 14, 1955, against AFFI Co., with the court finding that Sales "completed those repairs in a good, workmanlike manner", and further finding no cause of action as to Swindlehurst, based on the absence of privity of contract. On that day the plaintiff and the defendant Sales entered into an agreement that plaintiff would remove the trailer in 2 or 3 days without charge for storage, and that if plaintiff did not do so, there would be a charge for storage at the rate of $2 per day. Plaintiff Swindlehurst continued to refuse to take possession of the trailer and, about 9 months later, on October 19, 1955 (this being more than 5 years after defendant Sales received the trailer), defendant Sales, pursuant to the provisions of the garage-keeper's lien statute, (CL 1948, §570.301 et seq [Stat Ann 1960 Rev § 9.1711 et seq]), sold the trailer. The Ford tractor had been sold by Creed on April 12, 1954, pursuant to the provisions of the garage-keeper's lien statute, supra.

In April, 1956, Swindlehurst brought suit against AFFI Co. in Ingham county (Circuit Court No. 18020) demanding damages of $65,000.00 for breach of contract and loss of profits. After hearing part of the proofs the trial court ordered that a judgment of no cause of action be entered in favor of AFFI Co., holding that the issues had been previously adjudicated in the first suit tried before the Ingham county court and in an opinion, filed May 3, 1957, denying plaintiff's motion for a new trial, said:

> "The first case (Ingham County No. 15922) was based on what amounts to a conversion. The instant case is the same. If the plaintiff is right in the instant case, he should have appealed from the judgment entered in the former case.
>
> Motion for a new trial is denied."

The instant action for conversion was brought by Swindlehurst in September, 1957, naming AFFI Co., Sales and Creed as defendants. An order was entered in 1958,

dismissing Creed as a party defendant. Defendant Sales entered a plea of general denial; defendant AFFI Co. pleaded affirmative defenses of res judicata, split cause of action, election of remedies, and statute of limitations, and a plea of general denial. AFFI Co.'s motion to dismiss based on res judicata and the statute of limitations was denied by the Ingham county circuit court. The defendants' application for leave to appeal that decision was denied by the Supreme Court.

This case came to trail in November, 1962, and resulted in a jury verdict for Swindlehurst against AFFI Co. and Sales in the amount of $14,000 on the trailer, and for Swindlehurst against AFFI Co. alone in the amount of $42,000.00 on the tractor. Motions for a new trial were filed by both AFFI Co. and Sales on December 19, 1962, with subsequent motions to amend the original motions filed, authorized, and accepted by the trial court.

On August 31, 1964, twenty-one months after the motion for new trial was filed,* the trial court filed its opinion on the motions for a new trial, holding that the verdicts were execessive and that a new trial would be granted unless Swindlehurst filed a remittitur of $38,000 of the verdict against AFFI Co. on the tractor, leaving a judgment of $4,000; and a remittitur of $10,000 of the verdict against AFFI Co. and Sales on the trailer, leaving a judgment of $4,000. Swindlehurst thereafter filed his claim of appeal and AFFI Co. and Sales filed claims of cross-appeal.

The first question we consider is whether or not the trial court erred in denying a motion made by defendant, AFFI Co. for dismissal on the grounds of *res judicata*.

> "It is not intended that a controversy shall be tried over and over, but rather that one suit, in which issues are tried and disposed of on the merits, must conclude the litigation. If a party fails in making a full presentation of his case, whereby the judgment has passed against him, he cannot be permitted to make a better showing in a new suit." *Bank v. Billups* (1958), 351 Mich. 628, 635.

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* GCR 1963, 527.1(4).

In *Strech v. Blissfield Schools* (1959), 357 Mich. 620, 623, the Supreme Court said:

> "*Res judicata* applies not only to issues which were determined on their merits but also to matters which the parties had an opportunity to present for adjudication on the merits. *Porth v. Cadillac Motor Car Co.*, 209 Mich. 89; *Thompson v. Doore*, 269 Mich. 466; *McDaniel v. Black*, 270 Mich. 305; *Boyich v. J. A. Utley Co.*, 306 Mich. 625."

In *Machen v. Budd Wheel Co.*, (1933), 265 Mich. 530, 535, it is stated:

> "The doctrine of '*res judicata*' rests upon the principle that a question once determined by a court of competent jurisdiction by a judgment on the merits is forever settled so far as litigants and those in privity with them are concerned. * * *"

Also:

> "Where a valid and final personal judgment is rendered on the merits in favor of the defendant, the plaintiff cannot thereafter maintain an action on the original cause of action." Restatement, Judgments, § 48 (p. 191).

Plaintiff had alternative remedies available to him, though he had but one cause of action. He could sue on the contracts of insurance for breach or he could pursue the tort remedy of conversion. (See *Newman v. Olney*, 118 Mich. 545). Ingham County case No. 18020, filed April 20, 1956, by the plaintiff against AFFI Co., in which a judgment for the defendant for no cause of action was entered, is res judicata to the defendant AFFI Co. in the instant matter. In Restatement, Judgments, § 49, (p. 193) it is stated:

> "A judgment for the defendant is not on the merits where it is based merely on rules of procedure rather than on rules of substantive law. If the judgment

determines that the plaintiff has no cause of action, it is on the merits . . ."

Plaintiff having failed to make use of any remedy available to him after the adverse judgments in previous cases, cannot avoid the consequences of failing to appeal by bringing a new suit clothed in a different form of action but based on the same cause of action. The issue between the plaintiff and defendant AFFI Co. herein decided adversely to the plaintiff (Ingham county circuit court No. 18020) are the same issues involved in the instant suit. The justiciable controversy in this case has heretofore been determined by a court of competent jurisdiction. The trial court in this matter erred in not granting defendant AFFI Co.'s motion to dismiss on the grounds of res judicata.

At the conclusion of the plaintiff's evidence, defendant Sales' counsel moved the court to direct a verdict of no cause of action. The record shows that plaintiff failed to introduce material evidence that the defendant Sales did not comply with the garage-keeper's lien law. Plaintiff therefore did not establish a prima facie case of conversion. Defendant Sales' motion for a directed verdict of no cause of action should have been granted. *Thoma v. Tracy Motor Sales* (1960), 360 Mich. 434. In view of the decision herein, the other issues raised by the parties are irrelevant.

As to both defendants, the American Fidelity Fire Insurance Company and Henry Sales, the judgment of the trial court is reversed and a judgment of no cause of action shall be entered, with costs to appellees.

JUDGMENT OF THE SUPREME COURT

AT A SESSION OF THE SUPREME COURT OF THE STATE OF MICHIGAN, Held at the Supreme Court Room, in the Capitol, in the City of Lansing, on the 11th day of July in the year of our Lord one thousand nine hundred and sixty-six.

Present the Honorable

Thomas M. Kavanagh,
Chief Justice,
John R. Dethmers,
Harry F. Kelly,
Eugene F. Black,
Theodore Souris,
Otis M. Smith,
Michael D. O'Hara,
Paul L. Adams,
Associate Justices.

On order of the Court, the application for leave to appeal is considered, and the same is hereby DENIED, for the reason that while this Court does not concur with the reasoning by which the Count of Appeals reached its conclusion, nonetheless the Court is persuaded that the result reached by the Court of Appeals is correct.

STATE OF MICHIGAN—ss.

I, Donald F. Winters, Clerk of the Supreme Court of the State of Michigan, do hereby certify that the foregoing is a true and correct copy of an order entered in said court in said cause; that I have compared the same with the original, and that it is a true transcript therefrom, and the whole of said original order.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Supreme Court at Lansing, this 12th day of July in the year of our Lord one thousand nine hundred and sixty-six.

Donald F. Winters,
Clerk.

JUDGMENT

At a session of said Court, held in the Court Room in the City Hall, in the City of Lansing, Ingham County, Michigan, on this 5th day of August 1966.

Present: Hon. Sam Street Hughes, Circuit Judge.

In this cause it appearing from the pleadings on file herein that a motion to dismiss on the ground of res judicata having been filed by defendant American Fidelity Fire Insurance Company on October 14, 1957, and the said motion to dismiss thereafter having been brought on for hearing, and this Court having denied the said motion to dismiss by an order entered on May 1, 1958, and thereafter this cause having come on for jury trial commencing on November 13, 1962, and at the conclusion of the plaintiff's proofs a motion for directed verdict having been made by defendant American Fidelity Fire Insurance Company on the ground of res judicata, and a motion for a directed verdict also having been made by defendant Henry Sales, d/b/a Sales Welding, on the ground that plaintiff failed to establish a prima facie case of conversion against defendant Henry Sales, and this Court having denied the said motions for directed verdicts, and the said motions for directed verdicts having been renewed at the conclusion of all proofs and this Court again having denied the said motions for directed verdicts, and the cause thereafter having been submitted to the jury and the jury having returned a verdict in favor of plaintiff and against defendant American Fidelity Fire Insurance Company in the amount of $42,000.00 and a verdict in favor of plaintiff and against defendant American Fidelity Fire Insurance Company and defendant Henry Sales in the amount of $14,000.00, and a judgment on the said verdicts having been entered on December 5, 1962, and the respective defendants having filed motions for new trial and amendments to motions for new trial and for judgment notwithstanding the verdicts, and an order having been entered by this Court on September 9, 1964 denying the respective defendants' motions for judgment notwithstanding the verdicts but granting the defendants a new trial unless written remittiturs were filed by plaintiff, and the plaintiff having

failed to file written remittiturs and having appealed to the Michigan Supreme Court from this Court's order of September 9, 1964 granting defendants a new trial unless written remittiturs were filed, and the defendants having filed a cross-appeal to the Michigan Supreme Court from the verdicts and judgments rendered in this cause, from the orders of this Court denying the respective defendants' motions to dismiss, from this Court's refusal to grant the respective defendants' motions for directed verdicts of no cause for action, and from this Court's order of September 9, 1964 denying the respective defendants' motions for judgment notwithstanding the verdicts, and the said appeal and the said cross-appeal to the Michigan Supreme Court having been transferred to the Michigan Court of Appeals, and the said Court of Appeals having rendered its opinion in this cause on February 22, 1966, and it appearing from the said opinion that this Court erred in not granting defendant American Fidelity Fire Insurance Company's motion to dismiss, and it further appearing from the said opinion that this Court erred in not directing a verdict in favor of defendant Henry Sales, and the Court of Appeals by the said opinion of February 22, 1966 having reversed this Court and ordered the entry of a judgment of no cause for action as to both defendants with costs to the appellees, and the plaintiff having filed a petition for rehearing in the Court of Appeals, and the Court of Appeals having denied the petition for rehearing in an order dated April 29, 1966, and the plaintiff thereafter having filed an application for leave to appeal to the Michigan Supreme Court, and the Supreme Court in an order dated July 11, 1966 having denied the application for leave to appeal for the reason that the result reached by the Court of Appeals was correct, and it appearing proper to this Court that a judgment of no cause for action be entered as to both defendants with costs to be taxed in favor of the defendants in accordance with the directive of the Court of Appeals, and the Court being fully advised in the premises,

NOW, THEREFORE, IT IS ORDERED AND ADJUDGED that the plaintiff take nothing by his suit against defendant American Fidelity Fire Insurance Company and

go hereof without day and that defendant American Fidelity Fire Insurance Company recover against plaintiff its costs and charges to be taxed and have execution therefor.

IT IS FURTHER ORDERED AND ADJUDGED that the plaintiff take nothing by his suit against defendant Henry Sales and go hereof without day and that defendant Henry Sales recover against plaintiff his costs and charges to be taxed and have execution therefor.

Sam Street Hughes
Circuit Judge

Examined, Countersigned and
Entered by me:
Laura Wahl
Dep. Clerk

Attest: A True Copy
Inez Swaninger
Dep. Clerk

JUDGMENT OF THE SUPREME COURT

AT A SESSION OF THE SUPREME COURT OF THE STATE OF MICHIGAN, Held at the Supreme Court Room, in the Capitol, in the City of Lansing, on the 7th day of November in the year of our Lord one thousand nine hundred and sixty-six.

Present the Honorable

Thomas M. Kavanagh,
Chief Justice,
John R. Dethmers,
Harry F. Kelly,
Eugene F. Black,
Theodore Souris,
Otis M. Smith,
Michael D. O'Hara,
Paul L. Adams,
Associate Justices.

On order of the Court, the application to reconsider the order of this Court of July 11, 1966, denying leave to appeal is considered, and the same is DENIED, for the reason that it is not made to appear that said order was erroneous. The motion to dismiss the application is GRANTED. The request for the assessment of punitive damages is DENIED.

STATE OF MICHIGAN—ss.

I, Donald F. Winters, Clerk of the Supreme Court of the State of Michigan, do hereby certify that the foregoing is a true and correct copy of an order entered in said court in said cause; that I have compared the same with the original, and that it is a true transcript therefrom, and the whole of said original order.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Supreme Court at Lansing, this 7th day of November in the year of our Lord one thousand nine hundred and sixty-six.

Donald F. Winters,
Clerk.

SUPREME COURT, U. S.

APR 28 1967

JOHN F. DAVIS, CLERK

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1966

No. 1104

E. G. SWINDLEHURST,
Petitioner,
vs.
AMERICAN FIDELITY FIRE INSURANCE COMPANY, a foreign insurance company, and HENRY SALES, d/b/a Sales Welding,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MICHIGAN

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AMERICAN BRIEF AND RECORD COMPANY, FIFTY MARKET AVENUE, N.W., GRAND RAPIDS, MICHIGAN 49502 — PHONE GL 8-5326

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1966

No. 1104

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MICHIGAN

QUESTIONS PRESENTED FOR REVIEW

Respondent Henry Sales, d/b/a Sales Welding does not accept petitioner's question presented. A more concise statement of the question before the court is as follows:

> Where the plaintiff failed to introduce material evidence of non-compliance with the garage-keeper's lien law, (CL 1948, 570.301 et seq (Stat Ann 1960 Rev 9.1711 et seq)), plaintiff failed to establish a prima facie case of conversion; Thoma v. Tracy Motor Sales (1960), 360 Mich 434.

CONCISE STATEMENT OF THE CASE

This is a suit for the alleged conversion of plaintiff's 1950 Ford tractor and trailer. In September, 1950, plaintiff E. G. Swindlehurst was the owner of a tractor and

steel hauling trailer which were damaged in an accident. The equipment was insured with defendant American Fidelity Fire Insurance Company (hereinafter referred to as AFFI Co.) under separate policies $250 deductible collision insurance. Both policies gave the AFFI Co. the option of repair. AFFI Co. took possession of the damaged equipment, placing the trailer with defendant Henry Sales and the tractor with C. C. Creed, Inc. (hereinafter referred to as Creed) for the necessary repairs. Swindlehurst considered the repair work done by Sales and Creed to be unsatisfactory and refused to pay the $250 deductible due each for their work under the terms of the insurance policies or to retake possession of the equipment. Negotiations between the parties did not lead to any solution and a long record of litigation precedes the instant case.

In July, 1951, Swindlehurst brought a suit for breach of contract against AFFI Co. in Ingham county circuit court (No. 15,922). At the conclusion of Swindlehurst's proofs, AFFI Co.'s motion for a directed verdict of no cause of action on the merits was granted by the court, based on a failure to present proof as to damages. Swindlehurst's motion for a new trial was denied and no appeal was taken.

Separate suits were brought by Sales (Berrien county No. 9754) and Creed (Berrien county No. 9935) for the cost of repairs and storage charges, naming Swindlehurst and the AFFI Co. as defendants. A settlement was reached between Creed and the AFFI Co., and that suit was dismissed. The suit brought by Sales resulted in judgment on January 14, 1955, against AFFI Co. with the court finding that Sales "completed those repairs in a good, workmanlike manner", and further finding no cause of action as to Swindlehurst, based on the absence of privity of contract. On that day the plaintiff and the defendant Sales entered into an agreement that plaintiff would remove the trailer in 2 or 3 days without charge for storage, and that if plaintiff did not do so, there would be a charge for storage at the rate of $2 per day. Plaintiff Swindlehurst continued to refuse to take possession of the trailer and, about 9 months later, on October 19, 1955 (this being more than

5 years after defendant Sales received the trailer), defendant Sales, pursuant to the provisions of the garage-keeper's lien statute, (CL 1948, 570.301 et seq (Stat Ann 1960 Rev 9.1711 et seq)), sold the trailer. The Ford tractor had been sold by Creed on April 12, 1954, pursuant to the provisions of the garage-keeper's lien statute, supra.

In April, 1956, Swindlehurst brought suit against AFFI Co. in Ingham county (Circuit Court No. 18020) demanding damages of $65,000.00 for breach of contract and loss of profits. After hearing part of the proofs the trial court ordered that a judgment of no cause of action be entered in favor of AFFI Co., holding that the issues had been previously adjudicated in the first suit tried before the Ingham county court and in an opinion, filed May 3, 1957, denying plaintiff's motion for a new trial, said:

> "The first case (Ingham County No. 15922) was based on what amounts to a conversion. The instant case is the same. If the plaintiff is right in the instant case, he should have appealed from the judgment entered in the former case.
>
> Motion for a new trial is denied."

The instant action for conversion was brought by Swindlehurst in September, 1957, naming AFFI Co., Sales and Creed as defendants. An order was entered in 1958, dismissing Creed as a party defendant. Defendant Sales entered a plea of general denial; defendant AFFI Co. pleaded affirmative defenses of res judicata, split cause of action, election of remedies, and statute of limitations, and a plea of general denial. AFFI Co., motion to dismiss based on res judicata and the statute of limitations was denied by the Ingham county circuit court. The defendants' application for leave to appeal that decision was denied by the Supreme Court.

ARGUMENT

Nothing was said or done until after expiration for period of appeal which would indicate a federal and/or

constitutional question on the part of plaintiff-appellant. In this respect Defendant Henry Sales associates and includes as a part of his argument arguments set forth in brief in opposition by the American Fidelity Fire Insurance Company.

Respectfully submitted,

STEPHEN T. ROUMELL

(Counsel of Record for Respondent Henry Sales d/b/a Sales Welding)

New Buffalo, Michigan 49117

MAR 28 1967
JOHN F. DAVIS, CLERK

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1966

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IN THE SUPREME COURT OF THE UNITED STATES

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(Figures in parentheses followed by "a" refer to pages in petitioner's Appendix "A".)

QUESTIONS PRESENTED FOR REVIEW

Respondent American Fidelity Fire Insurance Company does not accept petitioner's question presented. A more concise statement of the question presented follows:

> Where a state appellate court sets aside a trial court jury verdict for a plaintiff and orders the entry of a judgment of no cause for action for a defendant on a determination by the state appellate court that there was no question of fact to be submitted to the jury because as a matter of law plaintiff's claim was barred

by res judicata, has the plaintiff been denied the right of trial by jury contrary to the Seventh Amendment to the Constitution of the United States?

CONCISE STATEMENT OF THE CASE

The present case (Ingham County Case No. 18,884) is petitioner's third suit against respondent American Fidelity Fire Insurance Company. The three suits arose from an accident which occurred in September of 1950 and which involved petitioner's tractor and trailer. The tractor and trailer were placed with separate garages for repairs (2a). Swindlehurst felt the repairs were unsatisfactory and he refused to pay the $250 deductible due each repairman. He also refused to take possession of his vehicles (2a).

In July of 1951 Swindlehurst commenced Ingham County Case No. 15,922 (2a). In this suit he alleged a breach of the contracts of insurance (2a). At the conclusion of Swindlehurst's proofs American Fidelity Fire Insurance Company's motion for directed verdict of no cause for action was granted on the ground that plaintiff failed to present proof as to damages (2a). Swindlehurst started Ingham County Case No. 18,020 against American Fidelity Fire Insurance Company in April of 1956 (3a). This latter suit was for breach of contract and loss of profits (3a). The trial court ordered the entry of a judgment of no cause for action for American Fidelity Fire Insurance Company on the ground that the issues had been adjudicated in Case No. 15,922 (3a). No appeal was taken.

Prior to the commencement of Case No. 18,020, the repairmen of the tractor and trailer sold the vehicles pursuant to the provisions of the garage-keeper's lien statute (*CL* 1948, Sec. 570.301 et seq. [*Mich Stat. Anno.*, Sec. 9.1711 et seq]). The tractor was sold on April 12, 1954 and the trailer on October 19, 1955 (3a).

The instant case was started in September of 1957 (3a). This is a suit for conversion of the tractor and trailer. The suit against the repairman of the tractor was dismissed, leaving only the suit against American Fidelity Fire Insurance Company and the repairer of the trailer, Henry Sales (3a-4a). American Fidelity Fire Insurance Com-

pany's motion to dismiss on the grounds of res judicata and statute of limitations was denied by the Ingham County trial court (4a). The Michigan Supreme Court denied American Fidelity Fire Insurance Company's application for leave to appeal from that decision (4a).

This case was tried before an Ingham County jury in November and December of 1962 and resulted in a verdict for petitioner in the amount of $42,000 against American Fidelity Fire Insurance Company alone on the tractor, and for petitioner in the amount of $14,000 against American Fidelity Fire Insurance Company and Sales on the trailer (4a). On August 31, 1964 the trial court ruled on the motions for judgment notwithstanding the verdict and for a new trial (4a). The trial court held that a new trial would be granted unless Swindlehurst filed a remittitur of $38,000 of the verdict against American Fidelity Fire Insurance Company on the tractor, and a remittitur of $10,000 of the verdict against American Fidelity Fire Insurance Company and Sales on the trailer (4a). The motion for judgment notwithstanding the verdict was denied. Swindlehurst appealed from the trial court's ruling (4a). Both American Fidelity Fire Insurance Company and Sales cross-appealed on the failure of the trial court to grant the various motions for directed verdicts, the motions to dismiss, and the motions for judgment notwithstanding the verdict (4a).

The Michigan Court of Appeals held that the matters in controversy between Swindlehurst and American Fidelity Fire Insurance Company had been fully adjudicated in Case No. 18,020, and that the trial court should have granted American Fidelity Fire Insurance Company's motion to dismiss (6a). In addition, the Court of Appeals held that Swindlehurst failed to establish that Sales did not comply with the garage-keeper's lien statute, and, consequently, he did not establish a prima facie case of conversion against Sales (6a). Sales' motion for a directed verdict should have been granted (6a).

On July 11, 1966 the Michigan Supreme Court denied Swindlehurst's application for leave to appeal (6a-7a). The Michigan Supreme Court on November 7, 1966 denied Swindlehurst's application to reconsider the order of July 11, 1966 denying leave to appeal (10a-11a).

ARGUMENT

A. Seventh Amendment Inapplicable to Civil Trials in State Courts

On page 12 petitioner states that the "principal reason for granting the writ is that the appellant was denied the right to a jury decision by action of the State Court, that violated the SEVENTH AMENDMENT to the Constitution of the United States." The within cause was tried in a state court. It is well settled that a litigant in a state court civil action has no constitutional right to a jury trial under the Seventh Amendment or under the due process clause of the Fourteenth Amendment. *Iacaponi v. New Amsterdam Casualty Company,* (D.C., W.D. Pa., 1966) 258 Fed. Supp. 880.

In *Minneapolis & St. Louis Railroad Company v. Bombolis* (1915), 241 U.S. 211, 60 L. Ed. 961, 36 Sup. Ct. 595, the United States Supreme Court stated on page 217:

> "* * * that the Seventh Amendment applies only to proceedings in courts of the United States and does not in any manner whatever govern or regulate trials by jury in state courts or the standards which must be applied concerning the same."

In *Olesen v. Trust Company of Chicago,* (7th Cir., 1957) 245 F. 2d 522, the Court said on page 524:

> "It is clear there is no federal question involved in the case at bar. The Seventh Amendment of the United States Constitution applies to trials in the United States Courts. *Bute v. People of State of Illinois,* 333 U.S. 640, 657 (footnote), 68 S. Ct. 763, 92 L. Ed. 986. Trial by jury in civil actions in state courts may be modified by a state or abolished altogether. * * *"

See also *Gustafson v. Peck,* (D.C., N.D. Iowa, W.D., 1963) 216 Fed. Supp. 370.

This petition is predicated on the Seventh Amendment guarantee of trial by jury. The federal courts have con-

sistently held that the right of trial by jury is inapplicable to civil trials in state courts. This alone is grounds for denial of the petition.

B. A State Appellate Court Can Set Aside a Jury Verdict Where No Fact Question Exists

It is fundamental that a state trial court can hear and determine motions to dismiss, and that a state appellate court can review the determination by the trial court. Rule 18 of the then applicable Michigan Court Rules of 1945 (see *Honigman, Michigan Court Rules Annotated,* p. 146-147) provided that a defendant, for various reasons, could file a motion to dismiss. One of the grounds for a motion to dismiss was prior adjudication (Rule 18, Sec. 1(e)). American Fidelity Fire Insurance Company filed a motion to dismiss this cause on October 14, 1957. This motion was based on res judicata and statute of limitations (4a). The trial court denied this motion (4a). American Fidelity Fire Insurance Company then filed its application for leave to appeal. This was denied by the Michigan Supreme Court (4a).

In this case the Michigan Court of Appeals in 1966 determined as a matter of law that the plaintiff's cause of action had previously been litigated by a court of competent jurisdiction (6a). The trial court, therefore, erred in not granting American Fidelity Fire Insurance Company's motion to dismiss on the ground of res judicata (6a). In denying Swindlehurst's application for leave to appeal, the Michigan Supreme Court held that the result reached by the Court of Appeals was correct (6a-7a). The Michigan Supreme Court and the Michigan Court of Appeals were eminently correct.

The doctrine of res judicata proclaims that at some point there must be an end or finality to litigation. In *Banks v. Billups* (1958), 351 Mich. 628, the Michigan Supreme Court stated on page 635:

> "* * * It is not intended that a controversy shall be tried over and over, but rather that one suit, in which issues are tried and disposed of on the merits,

must conclude the litigation. If a party fails in making a full presentation of his case, whereby the judgment has passed against him, he cannot be permitted to make a better showing in a new suit. * * *."

Petitioner's tractor was sold on foreclosure sale on April 12, 1954, and the foreclosure sale on the trailer occurred on October 19, 1955 (3a). Those sales divested Swindlehurst of any and all interest in the tractor and trailer (*CL* 1948, Sec. 570.301 et seq. [*Mich. Stat. Anno.*, Sec. 9.1711 et seq.]). Nothing that subsequently happened concerning the tractor and trailer had any effect whatsoever on Swindlehurst. If a conversion of either vehicle ever occurred, it was an accomplished fact at the time the respective foreclosure sales took place. If Swindlehurst had a cause of action to remedy an alleged wrong, it was in full fruition no later than the time of those foreclosure sales.

In April of 1956 Swindlehurst commenced Ingham County Case No. 18,020 (3a). This was a suit on the contracts of insurance (3a). At that time plaintiff had one *cause of action* to remedy the alleged wrong. There were alternative remedies available. He could sue on a contract theory, or he could proceed in a tort action for conversion. He elected to sue for breach of contract. The trial court heard part of the proofs and ordered the entry of a judgment of no cause for action for American Fidelity Fire Insurance Company on the ground that this matter had been adjudicated in Ingham County Case No. 15,922 (3a). This was a final judgment on the merits. Plaintiff's motion for a new trial was denied (3a). No appeal was taken.

The present case (No. 18,884) was for conversion and was commenced in September of 1957 (3a). Case No. 18,020 and this case were based on the same *cause of action*, though each was brought in a different *form of action*. The difference in the respective *forms of action* is not important. The identity of the *cause of action* is all important. Everything Swindlehurst claimed he was entitled to in the way of recovery in the instant case brought in the *form* of a tort action, could have been recovered in Case No. 18,020.

In *Machen v. Budd Wheel Co.* (1933), 265 Mich. 530, 535, the Michigan Supreme Court quoted with approval

from *Harrison v. Remington Paper Co.,* (C.C.A. 8th, 1905) 140 Fed. 385:

> " 'When the second suit is upon the same cause of action and between the same parties as the first, the judgment in the former suit is conclusive in the latter as to every question which was or might have been presented in the former.' "

See also the following from 30A *Am. Jur.* 409, Sec. 366 of Judgments.

> "The application of the doctrine of res judicata to identical causes of action does not depend upon the identity or differences in the *forms* of the two actions. A judgment upon the merits bars a subsequent suit upon the same *cause,* though brought in a different *form* of action, and a party therefore cannot, by varying the *form* of action or adopting a different method of presenting his case, escape the operation of the principle that one and the same *cause* of action shall not be twice litigated." (Emphasis ours).

We would also point out the following statement from Section 48, *Restatement of the Law of Judgments,* page 191:

> "Where a valid and final personal judgment is rendered on the merits in favor of the defendant, the plaintiff cannot thereafter maintain an action on the original cause of action."

Plaintiff's entire claim was litigated in Case No 18,020. All rights possessed by Swindlehurst were fully determined in that case. If the trial court was in error in 18,020, plaintiff should have appealed. Having failed to avail himself of his right of review, he is forever barred from relitigating his claim. The Michigan Supreme Court in *Machen v. Budd Wheel Co.,* supra, said on pages 535-536:

> "The doctrine of 'res judicata' rests upon the principle that a question once determined by a court of competent jurisdiction by a judgment on the merits is

forever settled so far as litigants and those in privity with them are concerned. * * *".

The Michigan Supreme Court and Court of Appeals are made up of honorable and distinguished jurists who are well able to distinguish between questions of fact for a jury and rules of law. It was decided in this case that plaintiff's claim was barred as a matter of law and that there was no fact question for the jury. That a state appellate court can reverse a lower court jury verdict for a plaintiff and order the entry of a judgment of no cause for action for a defendant is so obvious that no further citation of authority is needed.

C. Additional Grounds For Denying Petition for Writ of Certiorari

1. Petitioner Failed to Comply With United States Supreme Court Rules

Petitioner has not complied with the requirements of Rule 23, and especially with subrule 23.1(f). As is implicit from the foregoing, it is evident that petitioner has raised no real federal question. The two items on page 6 of the petition that he claims raise a federal question are vague and indefinite. The second of the two items purports to be a quote from the application for leave to appeal to the Michigan Supreme Court. In fact, it is a conglomeration of portions of his amendment to application for leave to appeal as well as some new matter.

Nor has petitioner complied with subrule 23.1(h). That subrule requires that the petitioner, in a direct and concise argument, amplify the reasons relied on for allowance of the writ. The closest petitioner comes to this requirement is on page 12 of the petition. The first paragraph on page 12 deals with the alleged violation of the Seventh Amendment. This has been treated above. In the second paragraph petitioner paints with a broad brush and asserts that 60.000,000 motorists are now subject to the loss of their vehicles without recourse. This ignores the facts in this

case. The totality of petitioner's problems stem from, and are directly traceable to, his stubborn refusal to pick up his vehicles and pay the deductible amount due for the repairs.

On pages 2 and 3, under the jurisdiction section of the petition, it is claimed there is diversity of citizenship in that plaintiff is a resident of Michigan and American Fidelity Fire Insurance Company is a New York corporation. Petitioner is correct insofar as the residences of Swindlehurst and American Fidelity Fire Insurance Company are concerned. This respondent is at a loss, however, as to what diversity of citizenship has to do with this petition for writ of certiorari. This case was never in a federal court. Petitioner seeks review on a writ of certiorari. Diversity of citizenship has nothing to do with a petition for writ of certiorari to review a state court decision. For the record, we would point out that there was not complete diversity since Henry Sales was a resident of Michigan.

2. Petition for Writ of Certiorari Not Timely Filed

The petition for writ of certiorari was not timely filed. On November 7, 1966 an order was entered by the Michigan Supreme Court denying petitioner's application to reconsider the order of July 11, 1966 denying leave to appeal (11a). The last day for filing the petition for writ of certiorari was February 6, 1967. Petitioner's Notice for Filing Petition for Writ of Certiorari and Contents of Record states that the petition was filed in the United States Supreme Court on February 25, 1967. That was nineteen days beyond the last day for filing the petition, and some seven and one-half months after the Michigan Supreme Court denied petitioner's application for leave to appeal on July 11, 1966.

On February 9, 1967 an Order Extending Time to File Petition for Writ of Certiorari was entered by the United States Supreme Court. The time for filing was extended to March 6, 1967. The order went on to say that the extension was "without prejudice to the Court's consideration of

whether this application has been filed in time." This matter has been in litigation since 1951, and this particular case since 1957. Petitioner's delay in filing his petition is not justified. Subrule 22.4 states that applications for extensions of time for filing a petition for writ of certiorari are not favored.

3. Matters Not Accurately and Fairly Presented

a. Interlocutory Order of Michigan Supreme Court in 1958 Not Final Order

In four separate places in the petition (page 3, paragraph (5); page 8, paragraph (5); page 10, last paragraph at bottom of page; page 11, paragraph commencing at bottom of page) reference is made to this respondent's 1958 application for leave to appeal to the Michigan Supreme Court following the trial court's denial of the motion to dismiss. Petitioner apparently would have this Court believe that the denial of that application was an affirmance of the trial court and a final rejection of the defense of res judicata. Nothing could be further from the truth. Prior to January 1, 1965, when Michigan's intermediate appellate court (Court of Appeals) came into being, the Michigan Supreme Court consistently held that the denial of an application for leave to appeal to the Supreme Court was not an affirmance of the order sought to be reviewed.

> "* * * We do not construe the denial of an application for leave to appeal as foreclosing litigants from ultimate review of interlocutory orders on appeal in the principal case. The denial of an application for leave to appeal is ordinarily an act of judicial discretion equivalent to the denial of certiorari. It is held that the denial of the writ of certiorari is not equivalent to an affirmation of the decree sought to be reviewed." *Malooly v. New York Heating & Ventilating Corp.* (1935), 270 Mich. 240, 247. See also *Great Lakes Realty Corp. v. Peters* (1953), 336 Mich. 325;

American Eutectic Welding Alloys Sales co. v. Grier (1961), 363 Mich. 175.

b. Michigan Supreme Court Order of July 11, 1966 Affirmed Conclusion and Result Reached by Michigan Court of Appeals

In denying Swindlehurst's application for leave to appeal, the Michigan Supreme Court stated in its order of July 11, 1966:

> "* * * the application for leave to appeal is considered, and the same is hereby DENIED, for the reason that while this Court does not concur with the reasoning by which the Court of Appeals reached its conclusion, nonetheless the Court is persuaded that the result reached by the Court of Appeals is correct."

Petitioner asserts on page 10, paragraph (12), that the Michigan Supreme Court thereby rejected the defense of res judicata, but sustained the result on the basis of the garage-keeper's foreclosure sales. This respondent is unable to comprehend the process by which petitioner reaches this startling conclusion. There is nothing in the record to support this contention. The order simply says that the "Court does not concur with the *reasoning* by which the Court of Appeals reached its *conclusion* * * *." However, the *result* reached by the Court of Appeals is correct."

The *conclusion* reached by the Court of Appeals was (1) plaintiff's cause of action against American Fidelity Fire Insurance Company was barred by res judicata, and (2) he failed to establish a prima facie case of conversion against Henry Sales. The *result* reached by the Court of Appeals was to order the entry of a judgment of no cause for action for American Fidelity Fire Insurance Company and Sales.

Conclusions are reached through a reasoning process. It is perfectly obvious that a conclusion can be correct even

though the reasons assigned for that conclusion are incorrect. It is fallacious to assume and argue that the conclusion of the Court of Appeals was wrong because the reasons for that conclusion may have been wrong. The order of July 11, 1966 merely states that the Supreme Court does not concur in the reasoning. At no time does the order say, or intimate, that the conclusion and result are in any way erroneous. On numerous occasions the Michigan Supreme Court has affirmed a trial court where the trial court arrived at a correct conclusion even though the reasons for the conclusion were erroneous. *Miller v. Kretschmer* (1965), 374 Mich. 459; *Queen Insurance Co v. Hammond* (1965), 374 Mich. 655.

c. No Prejudice

Petitioner contends on page 3, paragraph (5), of the petition that there was bias in favor of American Fidelity Fire Insurance Company and prejudice against petitioner. The prejudice is claimed to have stemmed from petitioner's name. It is contended that the Michigan courts were influenced by the first two syllables of petitioner's name, and that this prejudice deprived him of his right to the jury verdict. By this ruse, petitioner has called into question the integrity of the Michigan Supreme Court and the Michigan Court of Appeals. It is indeed unfortunate that he has seen fit to resort to the ill-advised and unfounded accusation.

CONCLUSION

For the reasons heretofore stated, respondent American Fidelity Fire Insurance Company respectfully requests that the petition for writ of certiorari be denied.

Respectfully submitted,

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1966

No. 1104

E. G. SWINDLEHURST,
Petitioner,
vs.
AMERICAN FIDELITY FIRE INSURANCE COMPANY,
a foreign insurance company, and
HENRY SALES, d/b/a Sales Welding,
Respondents.

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

The extension of time for filing a response granted to defendant Henry Sales on March 30, 1967 permits preparation of a Brief in support of the petition for a Writ of Certiorari and in reply to defendant American Fidelity Fire Insurance Company's brief in opposition, and it is respectfully submitted herewith, under Rule 38 4(a) Rules of the Supreme Court.

BASIS OF WRIT

The basis for petitioner's request for a Writ of Certiorari is the invasion of the constitutional guaranty, "No fact tried by a jury shall be otherwise re-examined in any Court of the United States than according to the rule of common law" by the Michigan Court of Appeals in ordering the Trial Court's judgment reversed because he should have granted a motion to dismiss on the grounds of res judicata made eight years earlier.

The situation presented here was the subject of a finding of this Court in *Slocum v. N. Y. Insurance Co.*, 228 US 364, where, on page 413, *Fowle v. Alexander*, 11 Wheaton 320, was quoted as follows:

> "Upon examination of the case at bar, it will be at once perceived that the demurrer to the evidence tried by the principles already stated is fatally defective. But when the demurrer was so framed as to let in defendants' evidence and thus rebut what the other side aimed to establish and to overthrow the presumption arising therefrom by counter presumptions it was the duty of the Circuit Court to overrule the demurrer as incorrect and untenable in principle. The question referred by it to the Court was not a question of law but of fact."

The doctrine of res judicata is, as a plea in bar, applicable to the conclusive determination of fact although it may include questions of law; *Freeman, Judgments* 5th ed p. 1328, 1329. The ultimate answer to mixed questions of law and fact must come from the jury; *Tucker v. Spalding*, 13 Wall US 453.

In this case the question of res judicata, based on prior determination, was raised on motion and resolved as being without merit. Thereafter, the defendant made it a matter of affirmative defense and presented evidence for jury consideration in support of it, argued it to the jury and requested jury instructions on it. The adverse jury verdict rejected it as a question of fact.

The same evidence and arguments were presented to the Court of Appeals on cross-appeal and was there reexamined. Their decision to reverse for the reasons that "the issue of the prior suit and the instant suit are the same" and "that the justifiable controversy in this case had been heretofore determined by a Court of competent jurisdiction" was based on their re-examination.

The findings of issues of fact by the Court, upon evidence, is altogether unknown to the common law Court

and cannot be recognized as a judicial act; *Rogers v. U. S.*, 141 US 548.

Petitioner respectfully requests a Writ of Certiorari to reverse the judgment that was based on an action, not judicial in nature, and in violation of applicant's constitutional guaranty as set forth in the Seventh Amendment.

REPLY TO DEFENDANT AMERICAN FIDELITY FIRE INSURANCE COMPANY'S BRIEF IN OPPOSITION TO THE WRIT

To this petition, the defendant American Fidelity Fire Insurance Company, says:

A. The Seventh Amendment is inapplicable to Civil Trials in State Courts:

The cases defendant insurance company cited pertain to the first portion of this *Amendment* — "In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved." He cites no cases on the constitutional guaranty portion that follows: "No fact tried by a jury shall be otherwise re-examined in any Court of the United States except according to the rules of common law."

It is conceded that the provision for a jury trial is a matter for the States and such provisions or the absence of it might be considered outside the constitutional guaranty. However, once a jury trial is in operation and terminated, the facts involved clearly may not be re-examined, for to do so, invades the province of the jury and violates the constitutional guaranty.

The constitutional guaranty to trial by jury is limited to the determination by the jury of controverted issues of fact; *Baltimore & Carolina Lines v. Redman*, 295 US 654.

The jury operation became part of the remedy guaranteed by the Constitution. Under the *Seventh Amendment* to the Federal Constitution our Appellate Courts can neither determine facts found by a jury any more than a lower Court can determine them; *Atlantic & Gulf Stevedores, Inc. v. Ellerman Lines, Ltd.*, 369 US 355.

Application of the *Seventh Amendment* to cases brought to the United States Supreme Court from state Courts was indicated in *N. Y. Times v. Sullivan,* 376 US 254, as follows: "This Amendment *(Seventh)* providing no fact tried by a jury shall be otherwise re-examined in any Court of the United States, than according to the common law is applicable to state cases coming to the Supreme Court."

> "As a practical matter since the doctrine has been established that the due process of law clause of the *Fourteenth Amendment* in its concept of 'liberty' forbids a denial of any of the fundamental principles of liberty and justice, the rule is well established that any of the rights enumerated in the first eight amendments, which may also be held to be in the nature of fundamental principles of liberty and justice, are absolutely protected from any state action or infringement by the *Fourteenth Amendment* in exactly the same manner as they are protected from federal abridgment by the guarantees of the *Federal Bill of Rights*". 16 Am. Jur. 2d § 334, p. 642.

and

> "The Supreme Court pointed out at a fairly early date after enactment of the *Fourteenth Amendment* that some of the personal rights safeguarded by the first eight amendments against national action may also be safeguarded against state action because denial of them would be denied of due process of law.
>
> "The general test as to whether a right is so included in the conception of due process of law was said to be: 'Is it a fundamental principle of liberty and justice which inheres to the very idea of free government and is the inalienable right of a citizen of such a government? If it is, and if it is of a nature that pertains to process of law, this court has declared it to be essential to due process of law'." *Twining v. New Jersey,* 211 US 78.

Petitioner's right passes this test. Petitioner's right to have the facts that were the basis for the jury verdict

stand without re-examination is a fundamental principle of liberty and justice, safeguarded by the *Seventh Amendment* as to fact re-examination, is an inalienable right, and is of a nature that pertains to due process of law and, therefore, should be declared essential to due process of law; this right should be absolutely protected from any state action or infringement on the part of the Michigan Court of Appeals and the Michigan Supreme Court.

B. A State Appellate Court can set aside a jury verdict where no fact question exists.

Counsel for defendant American Fidelity Fire Insurance Company makes reference to and quotes *Michigan Court Rule 18* correctly so far as he went. He neglected to set forth Section 3 thereof which states:

> "If upon the hearing of such motion, the opposite party shall present affidavits on the proofs denying the facts alleged or establishing facts obviating the objections, the Court may take proofs and hear and determine the same and may grant or deny the motion; but if disputed questions of fact are involved, the Court may deny the motion without prejudice and *shall* deny it if the action is one at law and the opposite party demands that the issue be submitted to a jury."

The defendant had the benefit of a court decision on motion and appellate review which should have resolved the question with prejudice but since disputed facts were involved and the action was one at law with a jury demanded, it was also submitted to the jury. There being no claim of insufficient evidence to support the verdict by defendant American Fidelity Fire Insurance Company, the claimed application of the doctrine of res judicata was resolved as a question of fact by the jury in a final manner.

It is to be noted that the Court of Appeals treated this matter as a motion to dismiss on the grounds of res judicata instead of motions for directed verdicts and for judgment notwithstanding the verdicts as set forth by defendant American Fidelity Fire Insurance Co. (page 14 — petition) (6a).

Petitioner has shown the motion to dismiss matter was not available for consideration by the Court of Appeals but the defense might be deemed available under the other designation. In this case it should be treated as set forth in *Sandra Lee Neely v. Martin K. Eby Construction Co.*, No. 12 October Term, March 20, 1967:

> "The opinion in the above cases (*Cone v. West Virginia Pulp & Paper Co.*, 330 US 212; *Globe Liquor Co. v. San Roman*, 332 US 571; *Johnson v. New York, H. H. & H. R. R.*, 344 US 48) make it clear that an Appellate Court may *not* order judgment notwithstanding verdict where the verdict loser has failed strictly to comply with the procedural requirements of *Rule 50(b)* or where the record reveals a new trial issue which has not been resolved. Part of the Court's concern has been to protect the rights of the party whose jury verdict has been set aside on appeal and who may have valid grounds for a new trial some or all of which should have been passed on by the district court rather than the Court of Appeals because of the judge's first-hand knowledge of witnesses, testimony and issues because of his feel of the overall case. These are very valid concerns to which the Court of Appeals should be constantly alert."

In this respect, *Michigan GCR 515* is modeled after and is deemed identical to *Rule 50(b)*; defendants' only motions made within the 20 days time allowed was for a new trial; the motion for judgment notwithstanding the verdict was not timely, being made seven months later than entry of judgment; and the record reveals an issue of a new trial that has not been resolved.

Therefore, even if defendant American Fidelity Fire Insurance Co.'s cross-appeal is treated as a judgment notwithstanding the verdict, it should be denied. There being no question of law before the Appellate Court, their action was on the facts and was, therefore, an invasion of the province of the jury.

C. Interlocutory order of Michigan Supreme Court in 1958 not final order.

This order was the result of defendant American Fidelity Fire Insurance Company proceeding under Section 14, P.A. 314, 1915, *Michigan Statutes Annotated* 27.2604. Section 15 states:

> "Upon the filing of a petition for a Writ of Certiorari in such case, the same shall be allowed and the writ issued, unless the justice or justices considering the application shall affirmatively determine from a consideration of the petition for such writ and the brief accompanying the same that such petition does not present a meritorious question."

Whether it was a final order or not is not deemed material when the procedure provided for in *Michigan Court Rule 18,* Section 3, supra, is considered but it is an affirmative finding of no merit to defendant's claim of res judicata by the highest court in the state. This resolved the question of law on July 24, 1958. Defendant American Fidelity Fire Insurance Company insisted on presenting this matter again, as a question of fact, for jury determination. After defendant insurance company presented the files of Case No. 18,020 and other evidence to the jury, re-examination by the Court of Appeals of these facts and their decision based thereon to order dismissal of this cause violated the *Seventh Amendment* by invading the province of the jury and was not a judicial act.

The three cases cited by defendant American Fidelity Fire Insurance Co. in support of their proposition do not involve conversion and, more important, do not have a jury involved.

D. Michigan Supreme Court order of July 11, 1966 affirmed conclusions and result reached by the Michigan Court of Appeals.

This action was, in fact, a joining in the invasion of applicant's constitutional guaranty. It might also be considered evasion and when a writ of certiorari is issued a further invasion of the *Seventh Amendment* guaranty

against re-examination of facts should appear. If it does, this action should be deemed not a judicial act and reversed.

The indication that the *Seventh Amendment* is concerned with substance, not form, is made by both the majority and dissenting opinions in *Slocum v. N. Y. Insurance Co., supra.* The majority opinion traced the history of this amendment and quoted from many early cases. *Parsons v. Bedford* (1830) is quoted as stating that trial by jury is justly dear to the American people, that every encroachment upon it is watched with great jealousy and that it is a fundamental guarantee of rights and liberty of people.

Since *Slocum v. N. Y. Insurance Co., supra,* (1912), it appears that the decisions on the *Seventh Amendment* have involved insufficient evidence to support the verdict situations.

This case has sufficient evidence to support the verdict. "The substantial thing" referred to in *Slocum v. N. Y. Insurance Co., supra,* is before the Court, "that the common law recognizes that the function of the jury was to deal with controversies of fact."

If petitioner's fundamental guarantee on the matter of substance here is recognized and enforced the jury verdict may be restored to him.

At this point reference should be made to defendant American Fidelity Fire Insurance Company's claim the petitioner failed to comply with the Court Rules and was not timely. Every effort has been made to follow the procedure set forth in *American Jurisprudence Pleading and Practice* as well as follow the guidance available from the office of the Solicitor General of Michigan. Our famous January blizzard made a request for an extension of time necessary. The application was filed one week in advance of the extension expiration. It is trusted these matters will not interfere with consideration of the basic issue.

While defendant American Fidelity Fire Insurance Company, in its brief in opposition, does not mention the bias matter resulting from the Court of Appeals adopting portions of its brief as their opinion, objection is made to the claim of prejudice based on plaintiff's name. I know

not what others may call it but the treatment plaintiff has received indicates prejudice to me. Reaction to petitioner's name appears as the only explanation for the continued and usually voluntary action taken against his interests. Again; I hope and trust this Court will not have this reaction.

ANALYSIS OF APPELLATE COURT DECISION PERTAINING TO HENRY SALES

In regard to the Appellate Courts' action concerning defendant Sales, the file of Berrien County, Michigan, Case No. 9754, had been received as an exhibit by stipulation before the trial; the instruments pertaining to the sales under the statutory provision were also in evidence by stipulation; defendant Sales had judgment for the repair bill and storage; there was, therefore, an issue of fact as to whether there was any basis for a lien upon which to base a statutory Garagekeeper's Lien which was set up as an affirmative defense by defendant Sales. On cross-examination, plaintiff testified he had not received notice of the alleged sale. This issue was one of fact for the jury. While there was material evidence in the record, it was not plaintiff's duty to provide evidence in support of defendant Sales' affirmative defense. Defendant Sales, in presenting his case, introduced evidence in support of the exhibits. These matters were facts for jury consideration and on appeal, after the court had not reserved judgment on them, were barred from consideration by the Appellate Court on the grounds stated. Furthermore, while Henry Sales filed a motion for a new trial, timely, on December 19, 1962, the motion for judgment notwithstanding the verdict was not timely, being made on July 17, 1963. The Court Rule in effect during the twenty days after entry of judgment did not treat these motions as merged.

The decisions of this Court from *Slocum* (1912) to *Neely* (1967) indicate that Appellate Courts may not review directed verdict decisions unless there has been a timely motion to have the verdict and any judgment entered set aside for the reasons set forth in the motion for a di-

rected verdict. A review without compliance with this requirement was deemed an invasion of the province of the jury. The Appellate Court was never granted greater right or authority than the Trial Court could have exercised and strict requirements of practice as to timely action were adhered to in adition to determining all issues in a light most favorable to the opposite party, usually the plaintiff, on questions of sufficiency of evidence; *Montgomery Ward & Co. v. Duncan*, 311 US 243.

If these principles are applied the Court of Appeals' action regarding defendant Henry Sales must be deemed an invasion of the province of the jury and should therefore be reversed. This is true because of the common law requirements and the decisions in cases, *Globe Liquor Co. v. San Roman, supra, Johnson v. New York H. H. & H. R. R., supra* and *Weade v. Dichmann, Wright & Pugh, Inc.*, 337 US 801.

RELIEF

Since the petitioner claims he has been deprived of a constitutional guaranty, the following decisions are deemed applicable:

> "The Supreme Court of the United States will make an independent examination of the facts in the case where it is asserted that a person has been deprived by a state court of a fundamental right secured by the constitution." *Craig v. Harvey*, 331 US 367; 54 Am. Jur. 859.

> "In cases where the Federal Constitutional rights are alleged to have been infringed by the state action it is incumbent on the Supreme Court of the United States to inquire not merely whether those rights have been denied in express terms but also whether they have been denied in substance and effect and to review independently both the legal issues and those factual matters with which they are co-mingled." *Oyama v. California*, 332 US 633; 54 Am. Jur. 859.

When this action is taken it will be apparent that plaintiff's case is based on: Conversion by an insurance company of an income producing tractor and trailer used in hauling steel interstate that had a net income in excess of $6,000.00 per year for its useful life. The defendant American Fidelity Fire Insurance Company, a New York corporation, took this equipment, in nearly new condition, for upset repairs and it was not returned. Various actions were taken by defendant's agents that either avoided or reduced defendant's obligations to the plaintiff that raised a question of exemplary damages. The disposal of the tractor and trailer was deemed a tort.

The trial by jury was on the issue of plaintiff's abandonment or defendants' conversion of the vehicles. It lasted eight days. The jury did an impressively careful job even to the point of requesting that certain specific instructions be repeated to them. The verdict for the plaintiff is supported by the evidence; there is no claim on the part of the defendants that it is not.

Prior to the trial, defendant had raised the question of res judicata. The trial court, in denying the motion, applied the principles in *Russell v. Price,* 94 US 606, set forth in the application (4) and *Cromwell v. Sac,* 94 US 351:

> "Judgment in prior cases operate as an estoppel only as to those matters in issue or points controverted upon the determination of which the finding or verdict was rendered.
>
> "The inquiry must always be as to the point or question actually litigated and determined in the original action for only as to such matters is the judgment conclusive in another action between the parties on a different demand."

The Michigan Supreme Court sustained the trial court by a finding that, under a statute, held the defendants' claims of res judicata to have no merit. After this action

by the Michigan Supreme Court and during the trial, the facts in support of defendants' defense of res judicata were presented by the defendant to the jury who rendered a verdict thereon.

The Court of Appeals, after the jury verdict, on the cross-appeal re-examined the evidence that had been presented to the jury and based thereon held a judgment should have been granted to defendant American Fidelity Fire Insurance Company and a directed verdict should have been granted Henry Sales by the trial court.

This re-examination of the factual evidence is prohibited by the *Seventh Amendment;* it is an infringement of a constitutional guaranty and the action so taken was "a denial of petitioner's rights in substance and effect" referred to in *Oyama v. California, supra.* It was not a judicial act and should be set aside and the judgment entered thereon reversed.

CORRECTIONS AND ADDITIONS TO THE PETITION

The reasons for granting the writ on page 12 of the petition are reemphasized and the following is added thereto:

Involved in this petition is a right and privilege that has the status of a constitutional guaranty. It has been asserted at the proper time and in the proper manner for a decision.

The state court has decided a federal question of substance that is believed has not heretofore been determined by the United States Supreme Court and done so in a way not in accord with the applicable decision of the United States Supreme Court. It should be determined by this Court.

It is claimed that the decision in the state court involves an infringement of the *Seventh Amendment* to the United States Constitution by re-examination of facts tried by a jury other than according to the rules of common law. This was done by violating the rulings of the United States Supreme Court:

(1) A judgment in prior cases operates as an estoppel only as to those matters in issue or points controverted upon determination of which the findings or verdict was rendered.

(2) The inquiry must always be to the point or question actually litigated and determined in the original action for only as to such matters is judgment conclusive in another action between the parties on a different demand.

(3) The doctrine of res judicata involved questions of fact and law and the final resolution of such mixed questions is with the jury.

(4) The examination of facts for other than sufficiency of evidence purposes is not a judicial act.

(5) The right to raise judgment notwithstanding verdict questions based on motions for directed verdicts shall be lost by not strictly adhering to rules on timely pleading.

The Court is respectfully asked to find infringements of the *Seventh Amendment* in the following particulars and take appropriate action therefor:

(1) An Appellate Court may not rule on a motion to dismiss after denial thereof, a pleading over and submitting facts on the question to a jury that renders a verdict thereon.

(2) The Appellate Courts' action of re-examining facts properly tried by a jury and reuling thereon is an invasion of the province of the jury.

(3) That the judgment based on such action must be reversed.

(4) That authority for the reversal is Section 2106, Title 28, or other appropriate authority.

CONCLUSION

The conclusion on page 13 of the petition is corrected as follows and respectfully resubmitted:

For the foregoing reasons the petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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